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No. 09-1380

IN THE
Supreme Court of the United States

THE NATIONAL FOOTBALL LEAGUE,
Petitioner,

v.

KEVIN WILLIAMS AND PAT WILLIAMS,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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In harmony with the Ninth Circuit but in direct conflict with the Seventh and Tenth Circuits, the Eighth Circuit held that defenses based on a collective bargaining agreement are irrelevant to whether state law claims originally brought in federal court are preempted under Section 301 of the Labor Management Relations Act ("LMRA"). Respondents largely ignore this conflict, relying instead on cases that are inapt or reinforce the conflict in the circuits. Beyond that, respondents' efforts to backhand the disruption to the law caused by the court of appeals' decision never comes to grips with the central importance of uniformity in the enforcement of collective bargaining agreements and arbitration awards issued to enforce their terms.

In this case, the Eighth Circuit's decision has allowed state-law claims to hijack for more than a year the enforcement of a lawful arbitration award issued under Section 301 that actually was *affirmed by the court of appeals* and, in the process, to unravel deliberately strict, collectively-bargained protections against the use of prohibited substances in professional sports.

I. THE EIGHTH CIRCUIT'S DECISION EXPANDS AN ENTRENCHED CONFLICT IN THE CIRCUITS AND CONTRAVENES THIS COURT'S PRECEDENT.

As the petition explains and four Circuit Judges below recognized, the root cause of the split in the circuits is the failure of the Eighth and Ninth Circuits, in contrast with the Seventh and Tenth Circuits, to enforce the fundamental distinction that this Court has drawn in Section 301 cases between

the jurisdictional doctrine of complete preemption and the substantive doctrine of ordinary preemption.

Complete preemption is a jurisdictional inquiry that addresses the removability to federal court of state law claims originally brought in state court. Because it is the plaintiff's complaint that controls this inquiry, removal may not be based on defenses asserted under the collective bargaining agreement. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 396-399 (1987).

Ordinary preemption applies when removability and jurisdiction are not in question, *i.e.*, to cases involving state law claims that already have been remanded to state court or (as here) were originally brought in federal court. In such cases, the Section 301 preemption analysis goes beyond the jurisdictional inquiry of the complete preemption doctrine and determines the ultimate question of substantive preemption on the merits. For that inquiry, defenses based on a collective bargaining agreement may be considered in determining if the state-law claims are preempted. *Caterpillar*, 482 U.S. at 398 n.13 (defenses relevant to preemption of remanded claims); *Lingle v. Norge Div. of Magic Chef*, 486 U.S. 399, 402, 407 (1988) (defenses relevant to preemption of state law claims brought in federal court).

A. As noted in the petition (at 9-10), the Seventh and Tenth Circuits have hewed to this Court's direction in *Caterpillar* and *Lingle* and held that defenses based on a collective bargaining agreement are relevant to Section 301 preemption of state law

claims originally brought in federal court. *Smith v. Colgate-Palmolive Co.*, 943 F.2d 764, 769-771 (7th Cir. 1991); *Fry v. Airline Pilots Ass'n*, 88 F.3d 831, 838 & n.8 (10th Cir. 1996).

Respondents' effort (BIO 16) to distinguish *Fry* on the ground that it arises under the Railway Labor Act ("RLA") fails. This Court held in *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 259 (1994), that the preemption inquiry under the RLA mirrors Section 301 analysis. And consistent with *Norris*, the Tenth Circuit in *Fry* applied the Section 301 framework in determining whether state law claims brought in federal court were preempted by the RLA.

In contrast to the Seventh and Tenth Circuits, a divided Eighth Circuit here conflated complete and ordinary preemption. In so doing, the Eighth Circuit tracked the law in the Ninth Circuit, which also has held that defenses based on a collective bargaining agreement are irrelevant to the preemption of state law claims originally brought in federal court. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 991 (9th Cir. 2001). Respondents contend that *Sprewell* did not "stake out a position on the issue. . . ." BIO 17. But that defies a plain reading of *Sprewell*. Even though the plaintiff's state law claims were brought in federal court in the first instance, thus making *Sprewell* an ordinary preemption case, the Ninth Circuit applied complete preemption principles, stating unequivocally that "any attempt by [defendants] to pull Sprewell's . . . claims in to the preemptive scope of section 301 *by mounting a defense in reliance on the [collective bargaining agreement] would be fruitless.*" *Sprewell*, 266 F.3d at

991 (emphasis added). To support that misplaced proposition, the Ninth Circuit relied on an earlier complete preemption case in which removability jurisdiction was at issue and held that "'the need to interpret the [collective bargaining agreement] must inhere in the nature of the plaintiff's claim.'" *Id.* (quoting *Cramer v. Consolidated Freightways, Inc.*, 255 F.3d. 683, 692 (9th Cir. 2001) (en banc)). *See also Cramer*, 255 F.3d at 688 (noting removability issue).[1]

Respondents' reliance (BIO 16) on *Karnes v. Boeing Co.*, 335 F.3d 1189 (10th Cir. 2003), demonstrates that they share the Eighth and Ninth Circuits' confusion. *Karnes* was a complete preemption case. The claims under the state drug-testing statute were originally brought in state court, and the defendant sought to remove the case to federal court under Section 301 on the basis of drug-testing provisions in a collective bargaining agreement. *Id.* at 1192. For that reason, the Tenth Circuit held that it must look solely to plaintiff's

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[1] Respondents wrongly assert (BIO 17-18) that the Ninth Circuit in *Sprewell* considered defenses as part of its preemption analysis. The Ninth Circuit merely posited that, even if the defendants in that case had argued that the collective bargaining agreement implicitly waived the plaintiff's claims, those claims would not be waived because the waiver was not express. 266 F.3d at 992. The Ninth Circuit's musings in dicta about the waiver of nonpreempted state law claims have nothing to do with whether collective bargaining agreement-based defenses should be factored into the preemption analysis, as this Court recognized in *Lingle*. *See* 486 U.S. at 409 n.9 (distinguishing between waiver of non-preempted state statutory rights and the preemption of those rights).

complaint in determining whether the case should be removed under Section 301. *Id.* at 1193.

B. Unable to escape the depth and breadth of the conflict in the courts, respondents wrongly argue (BIO 11-12) that the issue is not properly presented here. Respondents' assertion stems from the mere fact that the Eighth Circuit situated its holding that defenses are irrelevant to Section 301 preemption in its discussion of respondents' Lawful Consumable Products Act ("LCPA") claim, which is no longer in the case, and not in its discussion of the Drug Testing in the Workplace Act ("DATWA") claim, which remains in controversy. But the Eighth Circuit's categorical holding that defenses are irrelevant to Section 301 preemption analysis was not in any way dependent on the nature of the LCPA claim, which the dissenting judges below recognized. *See* Pet. App. 70a ("In holding that the claims are not preempted, the panel reasoned that the NFL's defenses to liability *under Minnesota law* must not be considered in determining whether the state-law claims are 'substantially dependent upon analysis' of a collective bargaining agreement, *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985), and thus preempted by § 301.") (emphasis added). Nor could it be. The role of defenses in Section 301 preemption is a question of federal law, not an issue that varies from one state-law claim to another.[2]

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[2] Respondents' contention (BIO 9-10) that this Court should deny the petition on the grounds that the Eighth Circuit lacked jurisdiction following the district court's remand of the case defies controlling precedent decided just last year. *See Carlsbad*

II. THE EIGHTH CIRCUIT'S DECISION PREVENTS THE UNIFORM ADMINISTRATION OF COLLECTIVE BARGAINING AGREEMENTS AND ARBITRAL AWARDS.

The foundational purpose of Section 301 preemption is ensuring uniformity in the administration of collective bargaining agreements, which is indispensable to Congress's intent that collective bargaining be the central mechanism for resolution of labor-management disputes. *Lingle*, 486 U.S. at 406. Like the Ninth Circuit in *Sprewell*, the Eighth Circuit's decision in this case makes such uniformity impossible and, in fact, openly invites the use of state-law claims to impair and impede the enforcement of collective bargaining agreements and their arbitration awards, even when, as here, an arbitration award has been upheld as lawful. The decision further empowers state courts to impose conflicting interpretations of the same collective bargaining agreement based on the limitless variability of state laws.

That is precisely what happened here. An arbitration award issued pursuant to the express and unambiguous terms of the Collective Bargaining Agreement ("CBA") between the NFL and the NFL Players Association upheld the suspensions of respondents, who play for the Minnesota Vikings, and three New Orleans Saints players for violating the CBA's Policy on Anabolic Steroids and Related

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Tech., Inc. v. HIF Bio, Inc., 129 S. Ct. 1862 (2009); *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336 (1976).

Substances ("Policy"). Pet. App. 2a-4a. But after the Eighth Circuit's "defenses are irrelevant" remand, respondents secured a Minnesota state court injunction against enforcement of the arbitrator's award. Pet. 16. The result was one rule (no suspensions for violating the Policy) for respondents and players in Minnesota and a different rule (suspensions for violating the Policy) for players in Louisiana and other states. That checkerboard administration of collective bargaining agreements is exactly what Section 301 is intended to prevent. *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103-04 (1962).

Respondents make no effort to deny these profound problems but instead offer arguments that do not withstand scrutiny.

First, respondents attempt (BIO 17) to pass off their use of state law to trump arbitral decisions under Section 301 as par for the jurisprudential course. But their argument depends largely on wrenching out of context this Court's statement in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 212 (1985), that "§ 301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law." In the very next sentence, the Court made clear that it was referring only to claims under state law that are "independent of a labor contract" -- that is, claims that, unlike here, are not preempted because their resolution does not require interpretation of a collective bargaining agreement. *Id.*

Moreover, respondents ignore that any challenge to the legality of the arbitration award was required to be made under the LMRA's "narrow" exception that allows federal courts to vacate arbitrator rulings only when they "run contrary to an explicit, well-defined, and dominant public policy." *Eastern Assoc. Coal Corp. v. United Mine Workers of Am.*, 531 U.S. 57, 63 (2000). The NFL Players Association challenged the award on those grounds. The court of appeals rejected that challenge and confirmed the award. Pet. App. 38a-39a. But in allowing respondents' separate challenge to proceed in state court, the court of appeals' ruling licensed a state judge to enjoin under state law the very award that the court of appeals had upheld under the LMRA as consistent with public policy. Respondents fail to confront that fundamental incoherence in the court of appeals' decision.[3]

Second, respondents fare no better with their citation to non-LMRA decisions for the proposition that "there is a strong presumption against preempting a state's legislation in the areas of the health and safety of its citizens." BIO 17. The LMRA recognizes no such "presumption," as confirmed by this Court's decision in *Lingle*. There, the Court applied ordinary Section 301 preemption principles

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[3] Respondents also contend that the NFL and the NFL Players' Association could not have waived through a collective bargaining agreement respondents' rights under DATWA. BIO 20. That is irrelevant because the NFL is not arguing that respondents' DATWA rights are waived. The NFL is arguing that the DATWA claims are preempted. That is very different. *See Lingle*, 486 U.S. at 409 n.9.

despite Illinois' strong public policy in favor of protecting the rights of employees in that State to seek redress for injuries under its workers' compensation law. *Id.* at 408-410 & n.6.[4]

Respondents' invocation of non-LMRA cases also confuses the standard for preemption under the LMRA -- which broadly requires "doctrines of federal labor law uniformly to prevail over inconsistent local rules," *Lucas Flour*, 369 U.S. at 104 -- with tests for preemption in different contexts. BIO 17-19 (citing *Wyeth v. Levine*, 129 S. Ct. 1187 (2009) (conflict preemption); *Farmer v. United Bhd. of Carpenters and Joiners of Am., Local 25*, 430 U.S. 290, 303 (1977) (National Labor Relations Act preemption)).

Third, respondents suggest (BIO 22-23) that, because Congress has not passed *another* law in addition to the LMRA, Congress must have intended for state laws (like DATWA) to create a state-by-state patchwork of rules governing the drug testing of athletes in national professional sports leagues. That argument is completely irrelevant to the question of how existing law -- the LMRA -- operates, as well as

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[4] Respondents get no help from their citation (BIO 18) to *Lodge 76 Int'l Ass'n. of Machinists and Aerospace Workers v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976). There, this Court held that recourse to state law to block union members' refusal to work overtime during negotiations for renewal of a collective bargaining agreement was preempted by the National Labor Relations Act's comprehensive federal policies, notwithstanding arguments about the importance of state prerogative in the area of health and safety. *Id.* at 149-151.

to the pressing need for this Court to bring uniformity to that statute's preemption principles.

The argument is also wrong. It simply ignores the praise that the NFL's strict anti-doping policy has received from Members of Congress, and Congress's full familiarity, evidenced through years of hearings, with the increasing role of collective bargaining agreements in addressing the problem of professional athletes' use of performance enhancing drugs. *See Amici Curiae* Brief of Major League Baseball, *et al.*, 6-10. The fact that Congress has not preempted respondents' claims a second time by passing yet another law thus says nothing about the need for this Court's review to bring uniformity to a federal law (the LMRA) that is itself expressly designed to ensure uniformity in the interpretation of collective bargaining agreements.

Finally, respondents assert (BIO 6) that this Court's review is not warranted because the state court litigation that has postponed enforcement of a lawful arbitration award for more than a year might (or might not) soon conclude, and thus the case might (or might not) become moot. Of course, respondents are arguing quite a different story in those state court proceedings, insisting that the case and its continuing injunction against enforcement of the arbitration award and other aspects of the collective bargaining agreement should continue at least for this football season. Resp. Minn. Ct. App. Opp. To NFL Mot. To Dismiss Appeal at 5, 10, *Williams v. NFL*, No. A10-922 (Minn. Ct. App. Sept. 15, 2010).

In any event, the contention that state court proceedings *might* be resolved in favor of the NFL is no answer to the question whether those state-court proceedings -- and, in particular, the ongoing state-law injunction against enforcement of a collectively bargained agreement and lawful arbitral award -- should exist in the first place or are, instead, preempted. Respondents have not confessed error; the litigation continues; and the injunction blocking the arbitration award upholding respondents' suspensions continues. Resp. App. 48a. The need for this Court's review likewise continues. *See Lewis v. Continental Bank Corp.* 494 U.S. 472, 477 (1990); *Elkins v. Moreno*, 435 U.S. 647, 676 (1978) (Rehnquist, J., dissenting) ("And while the case *may* become moot *if* the Court of Appeals of Maryland decides that holders of G-4 visas can establish Maryland domicile and *if* the University changes its policy in light of that decision, the case is *not* moot *now*.") (original emphasis).

Furthermore, if the Minnesota state court litigation were itself to become moot (BIO 7), it would be due to respondents' unilateral, deliberate, and voluntary decision, *after* obtaining an injunction pending appeal, not to file a notice of appeal while this certiorari petition was pending. Resp. App. 50a-61a. The appropriate response from this Court to voluntarily induced mootness that prevents this Court's review would be to grant the petition and then to vacate the Eighth Circuit's judgment of remand. "'[T]he established practice of the Court in dealing with a civil case from a court in the federal system which has become moot * * * pending [the Court's] decision on the merits is to reverse or vacate

the judgment below and remand with a direction to dismiss.'" *U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 22 (1994) (quoting *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950)). The central purpose of *Munsingwear* vacatur is to "clear[] the path for future relitigation of the issues between the parties," and to "prevent a judgment, unreviewable because of mootness, from spawning any legal consequences," *Munsingwear*, 340 U.S. at 40, 41, like the substantial inroads on LMRA preemption and the uniform enforcement of collective bargaining agreements and their arbitration awards that the Eighth Circuit's decision invites.[5]

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[5] Vacatur would be limited to the judgment of remand in *National Football League, et al. v. Williams*, (Eighth Circuit No. 09-2247, which is the only judgment of the Eighth Circuit pending before this Court. The court of appeals consolidated in a single decision its review of three separate appeals. However, no party sought review in this Court of the court of appeals' judgment rejecting the NFL Players' Association's separate appeal (*NFLPA v. NFL, et al.*, No. 09-2249), or of the judgment rejecting respondents' appeal challenging the dismissal of their state common law claims (*Williams v. NFL, et al.*, No. 09-2462).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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